

APPEAL NO. 170042

FILED MARCH 20, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 14, 2016, with the record closing on October 6, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to left carpal tunnel syndrome and ganglion cyst; (2) the compensable injury of (date of injury), does not extend to depression and anxiety; (3) the respondent (claimant) had disability from August 26, 2014, to the date of the CCH; (4) the claimant has not reached maximum medical improvement (MMI); and (5) because the claimant has not reached MMI, her impairment rating (IR) cannot yet be determined.

The appellant (carrier) appealed the hearing officer's determination that the compensable injury extends to left carpal tunnel syndrome and ganglion cyst, as well as the hearing officer's determinations on MMI, IR, and disability. The carrier contends that the evidence does not support the appealed determinations. The carrier also contends that the date of statutory MMI occurred in June 2016, and therefore the hearing officer erred in determining that the claimant has not attained MMI at a point past statutory MMI. The appeal file does not contain a response from the claimant to the carrier's appeal.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to depression and anxiety was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reformed in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury in the form of a left elbow and left forearm sprain and tenosynovitis in the left hand and wrist on (date of injury). The claimant testified she sustained injuries while working as a presser for the employer.

The decision states in Finding of Fact No. 1.F. that the parties stipulated the claimant reached clinical MMI August 25, 2014, with a zero percent IR as certified by designated doctor (Dr. K). However, a review of the record reflects that the parties did

not make that stipulation at the CCH, nor is there any indication in the appeal file that the parties made this stipulation after the CCH. Additionally, the hearing officer determined that the claimant has not reached MMI and therefore her IR cannot yet be determined. We reform the decision by striking Finding of Fact No. 1.F. to reflect the correct stipulations made by the parties at the CCH.

### **EXTENT OF INJURY**

The hearing officer's determination that the (date of injury), compensable injury extends to left carpal tunnel syndrome and ganglion cyst is supported by the evidence and is affirmed.

### **DISABILITY**

The hearing officer's determination that the claimant had disability from August 26, 2014, to the date of the CCH is supported by sufficient evidence and is affirmed.

### **MMI/IR**

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors.

The hearing officer found that "[t]he determination of the designated doctor, [Dr. K], M.D., that [the] [c]laimant had not reached MMI but was expected to on December 1, 2016, is not contrary to the preponderance of the evidence," and therefore determined that the claimant has not reached MMI and therefore her IR cannot yet be determined. Dr. K's examination occurred on September 8, 2016, and the date of certification listed on the Report of Medical Evaluation (DWC-69) is September 8, 2016.

We note that statutory MMI was not discussed at the CCH and the hearing officer made no mention or finding of when statutory MMI occurred. The date of injury was (date of injury). In evidence is a Request for Designated Doctor Examination (DWC-32)

from the carrier that lists the statutory date of MMI as being June 21, 2016. Also in evidence is a Notice of First Temporary Income Benefit Payment (PLN-2) dated July 1, 2014, stating that the eighth day of disability is June 25, 2014. Section 401.011(30) provides MMI means the earlier of: (A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. Given there is some evidence that the eighth day of disability was June 25, 2014, the date of statutory MMI for the claimant could be June 22, 2016, which is the expiration of 104 weeks from June 25, 2014. Additionally, there is some evidence that the date of statutory MMI is June 21, 2016. Dr. K's September 8, 2016, MMI/IR certification that the claimant has not reached MMI but is expected to do so on or about December 1, 2016, is potentially legally incorrect, and as such cannot be adopted.

We note there are several other MMI/IR certifications in evidence from various doctors, including (Dr. F), a previously-appointed designated doctor to determine MMI and IR, (Dr. L), a doctor acting in place of the treating doctor, and Dr. K. However, none of those MMI/IR certifications consider and rate the entire compensable injury of a left elbow and left forearm sprain and tenosynovitis of the left hand and wrist, left carpal tunnel syndrome, and ganglion cyst. Because Dr. K's September 8, 2016, MMI/IR certification that the claimant has not reached MMI but is expected to do so on or about December 1, 2016, cannot be adopted as explained above, and because there are no other MMI/IR certifications in evidence that can be adopted, we reverse the hearing officer's determinations that the claimant has not reached MMI and therefore no IR can be determined at this time, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **SUMMARY**

We affirm the hearing officer's determination that the (date of injury), compensable injury extends to left carpal tunnel syndrome and ganglion cyst.

We affirm the hearing officer's determination that the claimant had disability from August 26, 2014, to the date of the CCH.

We reform the decision by striking Finding of Fact No. 1.F. to reflect the correct stipulations made by the parties at the CCH.

We reverse the hearing officer's determinations that the claimant has not reached MMI and therefore no IR can be determined at this time, and we remand the

issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

The hearing officer is to have the parties agree or stipulate to the date of statutory MMI. If the parties do not agree or stipulate to the date of statutory MMI, the hearing officer is to make a finding on the date of statutory MMI.

Dr. K is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the compensable injury of (date of injury).

The hearing officer is to advise the designated doctor of the statutory date of MMI and that the compensable injury of (date of injury), includes a left elbow and left forearm sprain and tenosynovitis of the left hand and wrist, left carpal tunnel syndrome, and ganglion cyst.

The certification of MMI can be no later than the statutory date of MMI. The certification of MMI should be the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated considering the physical examination and the claimant's medical records. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the Guides to the Evaluation of Permanent Impairment fourth edition (1st, 2nd, 3rd or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) and the provisions of 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)). The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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K. Eugene Kraft  
Appeals Judge

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Margaret L. Turner  
Appeals Judge